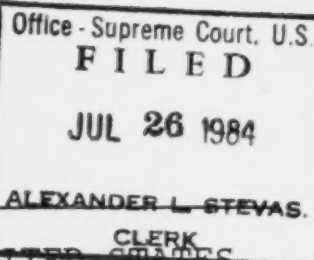


84-149

NO.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SHELBY RIGGS, ET AL.,  
PETITIONERS

V.

COMMONWEALTH OF KENTUCKY, ET AL.,  
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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July, 1984

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52 pp



## QUESTION PRESENTED

Whether a State, consistent with the due process clause of the Fourteenth Amendment, may terminate by lay-off the employment of state merit system employees without adequate pretermination protections and in violation of prescribed state procedures.

## PARTIES TO THE PROCEEDINGS

Other parties, in addition to those named in the caption, are included in the footnotes below.

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\* Additional plaintiffs: Sarah Hammonds, Morrison Cook, Jack Greene, Marvin Cole, H. Jane Jaggers, Edward Spencer, Lloyd Ryles, Sr., Lois Smith, Kyle Ball, Davis Pearsman, Thomas Jasper, Ralph Murphy, Marjorie Ralston, Paul Camplin, Rita McMahon, Billy Furnish, Ruth Mayeux, Ann Peel, Catherine Hayden, Davis Jackson, Sr., G.L. Jackson, Earl Howard, Phyllis Eggen, Mary Peter, James Fuller, Jr., Glenn Howell, F. Gayle Havens, John Thomas, Patricia Jerry, Martha Brown, James Huffines, Sr., W. Kenneth Keown, Dorothy Hoskins, William Carver, Jr., Gary Wooldridge, Jack Walker, Charles Davis, Kelly Daniels, James Brown,



Larry Shoemaker, Albert Sperath, Roberta Gabbard, Karan Sullivan, George Puckett, and Mary Alexander

\*\* Additional defendants: John Y. Brown, Governor, Commonwealth of Kentucky; Dee Maynard, Commissioner, Kentucky Department of Personnel and Secretary, Kentucky Personnel Board; Phillip Taliaferro, Chairman, Kentucky Personnel Board; Libby Walthall, Vice-Chairman, Kentucky Personnel Board; James S. Way, Member, Kentucky Personnel Board; John W. McNeill, Member, Kentucky Personnel Board; W. Grady Stumbo, Secretary, Kentucky Department for Human Resources; Bruce Lunsford, Secretary, Kentucky Commerce Cabinet; Frank R. Metts, Secretary, Kentucky Department of Transportation; Jackie Swigart, Secretary, Kentucky Department for Natural Resources and Environmental Protection; John R. Groves, Jr., Commissioner, Kentucky Department of Housing, Buildings and Construction; Robert H. Allphin, Commissioner, Kentucky Department of Revenue; George L. Atkins, Secretary, Kentucky Department of Finance; Don Mills, Secretary, Kentucky Education and Humanities Cabinet; Lois Mateus, Commissioner, Kentucky Department of the Arts; James A. Nelson, State Librarian; Raymond Barber, Superintendent of Public Instruction; Roger Peterman, Executive Director, Kentucky Development Finance Authority; Neil J. Welch, Secretary, Kentucky Department of Justice; George W. Wilson, Secretary, Kentucky Department of Corrections; Daniel D. Briscoe, Commissioner, Kentucky Department of Insurance, Richard H. Lewis, Commissioner, Kentucky Department of Alcoholic Beverage Control; Joseph R. Bell, Executive Vice President, Kentucky Fair and Exposition Center; Billy G. Wellman, Adjutant General, Kentucky Department of Military Affairs; Andrew "Skipper" Martin, Commissioner, Kentucky Department of Community and Regional Development; George Fischer, Secretary, Kentucky Personnel and Management Cabinet;



Mike Robinson, Director of Administrative Control; Matthew J. Amato, Jr., Director, Division of Personnel Management; Rita Young, Acting Director, Office of Personnel Management; Ernest P. Fowler, Acting Director, Division of Management Services; Vert Taylor, Director of Personnel; Robert E. Blanz, Director, Division of Water Quality; James E. Stewart, Director, Division of Management Services; and Willard Stanley, Commissioner, Kentucky Department of Mines and Minerals.



## TABLE OF CONTENTS

	Page
Opinions Below . . . . .	1
Jurisdiction . . . . .	2
Statutes and Regulations . . . . .	2
Statement . . . . .	5
Reasons for Granting the Petition . .	12
Conclusion . . . . .	20
Appendix A . . . . .	1a
Appendix B . . . . .	12a
Appendix C . . . . .	27a

## TABLE OF AUTHORITIES

### Cases:

<u>Board of Education v. Roth</u> , 408	
<u>U.S. 564 (1972)</u> . . . . .	11, 13
<u>Board of Education v.</u>	
<u>Vail</u> , 104 S.Ct. 2144 (1984),	
<u>aff'g 706 F.2d 1435 (7th Cir.</u>	
<u>1983)</u> . . . . .	14
<u>Cleveland Board of Education</u>	
<u>v. Loudermill</u> , 721 F.2d 550	
<u>(6th Cir. 1983), cert. granted,</u>	
<u>104 S.Ct. 2384 (1984)</u> . . . . .	18
<u>Davis v. Scherer</u> , 52 U.S.L.W.	
<u>4956 (U.S. June 28, 1984)</u> . . . . .	19
<u>Hudson v. Palmer</u> , 52 U.S.L.W.	
<u>5052 (U.S. July 3, 1984)</u> . . . . .	16
<u>Logan v. Zimmerman Brush Co.</u> . .	14
<u>Parma Board of Education</u>	
<u>v. Donnelly</u> , 721 F.2d 550	
<u>(6th Cir. 1983), cert. granted,</u>	
<u>104 S.Ct. 2384 (1984)</u> . . . . .	18



Cases -- Continued	Pages
<u>Parrott v. Taylor</u> , 451 U.S. 527	
(1981) . . . . .	17
<u>Patsy v. Board of Regents</u> , 457	
U.S. 496 (1982) . . . . .	10
<u>Vitek v. Jones</u> , 445 U.S. 480	
(1980) . . . . .	14

Constitutional Provisions,  
Statutes and Regulations:

U.S. Constit., Amend. 14 . . . .	1-20
42 U.S.C. § 1983 . . . . .	2, 11
Ky. Rev. Stat. § 18.120 . . . . .	6
Ky. Rev. Stat. § 18.210 . . . . .	3, 8, 15
Ky. Rev. Stat. § 18.217 . . . . .	3, 8
101 Ky. Admin. Reg. . . . .	4, 6



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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NO.

SHELBY RIGGS, ET AL.,  
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V.

COMMONWEALTH OF KENTUCKY, ET AL.,  
RESPONDENTS

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

The petitioners, forty-seven present and former Kentucky state employees, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 10, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 734 F.2d 262 and appears in



the Appendix hereto (App. A, infra, 1a-11a). The opinion of the United States District Court for the Western District of Kentucky appears as Appendix B, infra, 12a-26a.

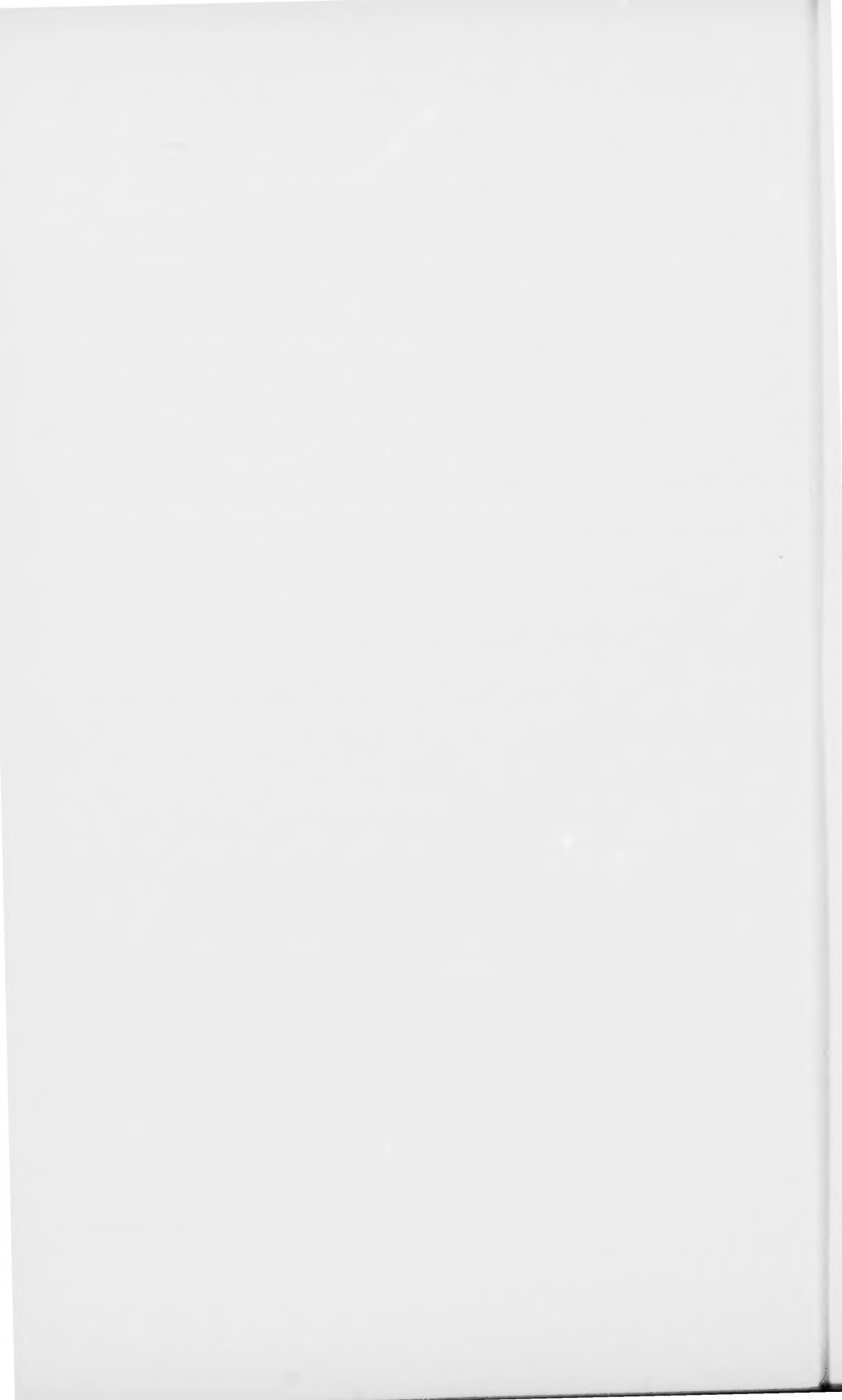
### JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 10, 1984. A timely petition for rehearing was denied on May 1, 1984 (App. C, infra, 27a), and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit



in equity, or any other proper proceeding for redress.

2. Ky. Rev. Stat. § 18.210 provides in pertinent part:

18.210. Rules for classified service. -- The commissioner of personnel shall prepare and submit to the personnel board proposed rules for the classified service . . . The rules shall provide

\* \* \* \*

(14) For lay-offs by reasons of lack of funds or work, or abolishment of a position, or material change in duties or organization, and for reinstatement of employees so laid off, giving consideration in both lay-offs and reemployment to qualifications, performance records, conduct and seniority in service;

3. Ky. Rev. Stat. § 18.217 provides:

18.217. Reemployment of employees with classified service status --

(1) Any career employee who has been laid off or dismissed, other than for cause, and, in the case of an unclassified management employee, resignation other than resignation in lieu of dismissal for cause, shall be placed on reemployment lists for those classes of positions for which he is qualified and passes the appropriate selection method. Such career employee shall notify the department of personnel in writing that he desires reemployment in order to be eligible for placement on reemployment lists.

(2) If more than one (1) career employee requests to be placed on



the reemployment list for any job classification, the department of personnel shall list the names of such career employees in the order of the seniority.

(3) No vacancy may be filled from a competitive register until all career employees on the reemployment list for that class of position have been given full consideration for reemployment. An appointing authority may refuse to reemploy a qualified employee on the reemployment list only for cause. The commissioner of personnel and the employee shall be furnished with a written statement of the specific reasons for the refusal within ten (10) days following the appointing authority's refusal. The employee may appeal the appointing authority's action in accordance with KRS 18.270 to 18.272.

4. 101 Ky. Admin. Reg. 1:120 provides in pertinent part:

Section 1. General Provisions. Except as otherwise provided in these rules, the tenure of an employee with status shall be during good behavior and the satisfactory performance of his duties.

Section 2. Layoffs. (1) An appointing authority may layoff an employee in the classified service whenever he deems it necessary by reason of shortage of funds or work, abolishment of a position, or other material change in duties or organization. An employee with status may appeal his lay-off in accordance with 101 KAR 1:130. The employee shall



be notified of the effective date at least fourteen (14) calendar days prior to such effective date and shall be given written notice of the reasons for the layoff and of his right to appeal. The appointing authority shall conduct a personal interview with each laid-off employee to explain the re-employment rights available to that employee under the merit system regulations, unless circumstances prevent such an interview; such circumstances must be detailed in writing to the Commissioner of Personnel.

(2) Seniority, performance, appraisals, conduct, qualifications and type of appointment shall be considered in determining the order of layoffs in a manner prescribed or approved by the commissioner. No status employee is to be separated by layoff while there are provisional, temporary, emergency, or probationary employees serving in the agency in the same class in the same locality.

(3) The appointing authority and the department shall attempt to place the employee in another position for which the employee is qualified.

#### STATEMENT

Kentucky, like most states, has enacted an elaborate merit or civil service system designed to promote efficiency in state government and to protect state employees from the arbitrary actions of state political



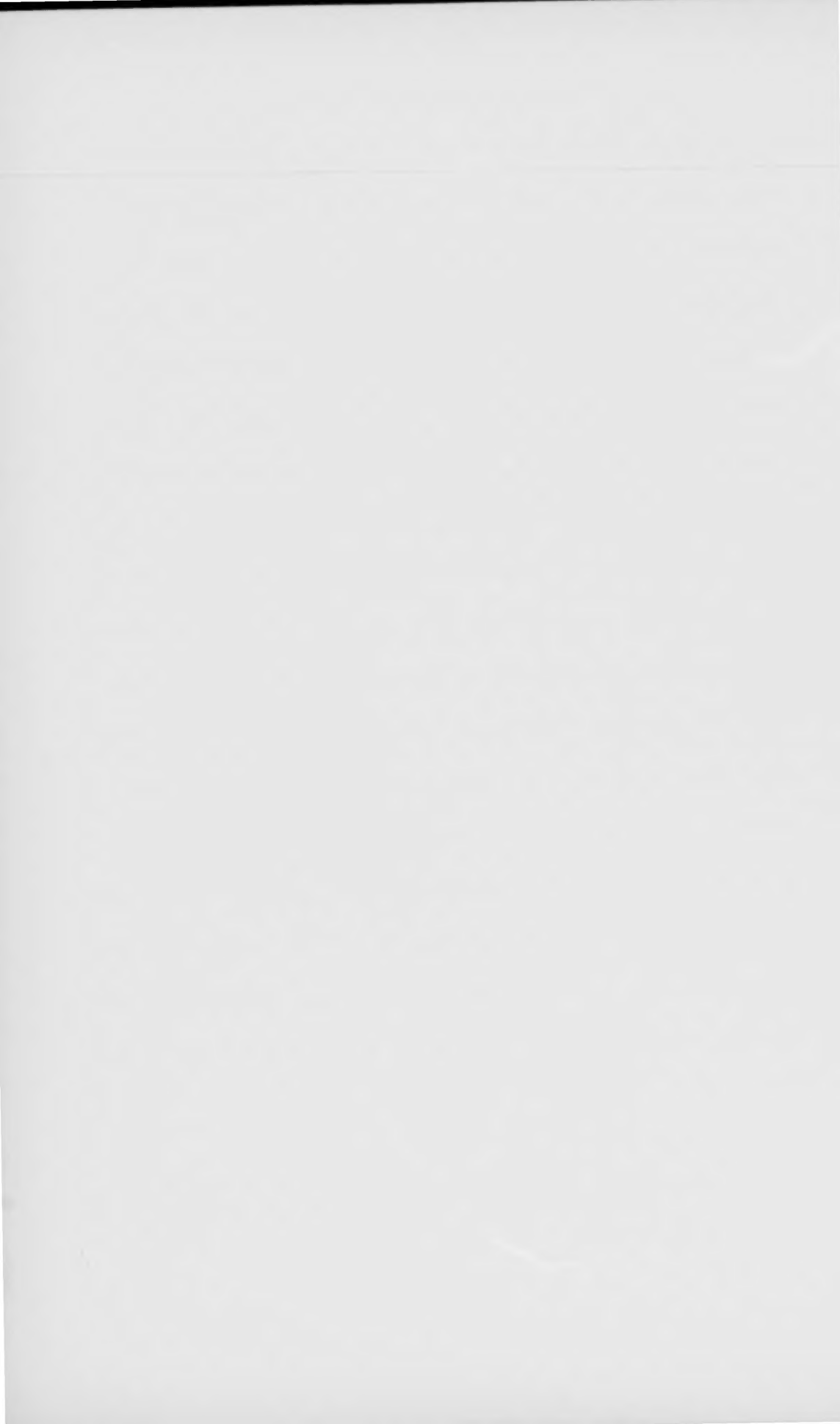
officials. See Ky. Rev. Stat. (hereinafter KRS) § 18.120 et seq. The Kentucky merit scheme, which is at the heart of this case, embodies a complex of rules and regulations covering a wide variety of typical personnel issues. See KRS §§ 18.110 - 18.360 and 101 Ky. Admin. Reg. (hereinafter KAR) §§ 1:010 - 1:200. The Kentucky merit scheme creates a classified service composed of employees who have gained status (or tenure) under this system. "'Status' means the acquisition of tenure with all rights and privileges appertaining thereunto after satisfactory completion of the probationary period by an employe [sic] in the classified service." KRS § 18.110(17). All the petitioners in this case were at one time status employees working throughout the agencies and departments of Kentucky state government. All lost this hard-earned status between December 11, 1979, and October 19, 1981.



During this time, the Governor of Kentucky, John Y. Brown, acting pursuant to the authority given him in KRS chapter 12 to reorganize state government, oversaw the implementation of 254 so-called layoff plans, involving approximately thirty departments. These plans called for the termination, pursuant to layoff, of some 1,800 status employees. This lawsuit was commenced on September 1, 1981, on behalf of 42 named plaintiffs seeking to represent the class of 1,800 state employees adversely affected by the layoffs.<sup>1</sup> The 36 defendants included the Governor, and the top officials responsible for personnel matters in Kentucky state government. The petitioners' complaint alleged that, in formulating and implementing the 254 layoff plans, the respondents effectively circumvented the established merit system and procedures and

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1. Five additional plaintiffs were permitted to intervene in the District Court.



deprived the petitioners of property interests in their employment without due process of law.

Specifically, the complaint alleged that, although the layoff plans were adequate on their face, as applied they deprived the petitioners of a variety of protections granted to status employees under Kentucky law. For example, the plaintiffs asserted that, contrary to KRS § 18.210(14), the layoff plans failed to consider the qualifications, performance records, conduct, and seniority of the 1800 affected employees. It also alleged that, contrary to the requirements of KRS § 18.217 and 101 KAR 1:120, the respondents failed properly to fill existing job vacancies from among the merit employees adversely affected by the layoff plans.

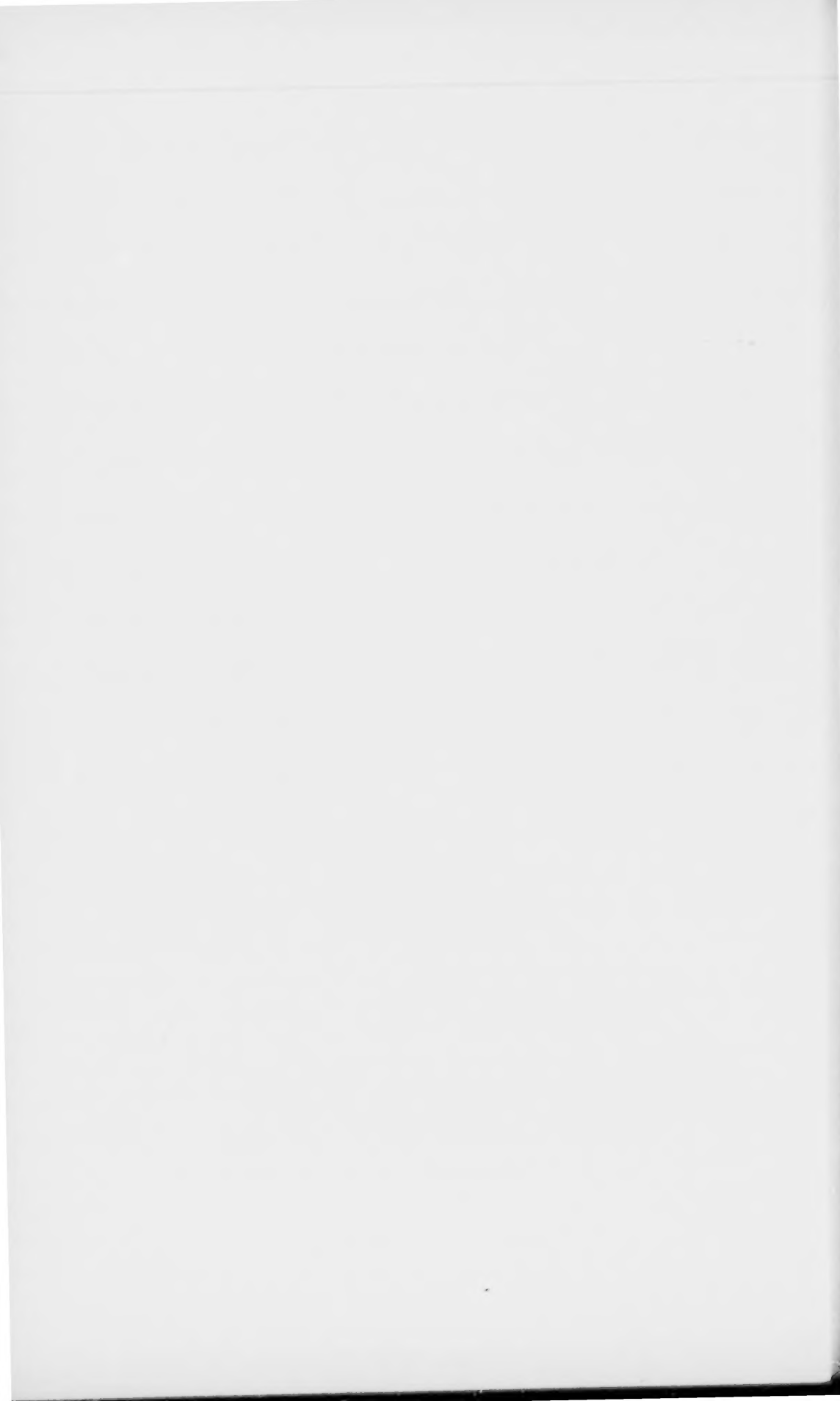
For example, at no time prior to termination were the petitioners offered another position within the department or agency from which he or she was laid off nor in any other branch of state government. The laid



off employees were not allowed to exercise their seniority in order to "bump" other employees from positions for which laid off employees were qualified. These employees also were not evaluated or otherwise informed that they were being terminated or laid off consistent with a plan that considered their seniority, qualifications, conduct, or performance. Many long-standing employees simply received a one-page letter informing them that, effective in a few days, they were to be laid off. This letter also gave the general reason for the lay off and set out certain appeal rights. The complaint sought injunctive relief, primarily reinstatement, back pay, and damages.<sup>2</sup>

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2 The complaint also claimed that the layoff plans had a disparate impact on employees over forty years of age. This claim, which is still before the District Court, was not part of the appeal to the Court of Appeals and is not treated in this Petition.



In response to the complaint, the respondents filed a motion to dismiss for lack of jurisdiction and for summary judgment. Attached to the motion were numerous affidavits and documents allegedly showing that the layoffs were implemented consistent with state law. Because no discovery was permitted by the trial court, the petitioners responded with affidavits by the affected employees disputing the respondents' contentions that, in formulating and implementing the layoff plans, state law and regulations were observed. These affidavits also set forth the circumstances surrounding each employee's adverse job action.

On January 28, 1983, the District Court granted the respondents' motion.<sup>3</sup> Drawing a distinction between a layoff and a discharge

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3. The District Court had delayed ruling on the motion pending the decision in Patsy v. Board of Regents, 457 U.S. 496 (1982).



for cause, the Court found that "[a] Kentucky employee's claimed entitlement to continued employment is no more than a unilateral expectation and does not rise to the level of a constitutionally protected property right. Board of Regents v. Roth, supra." It thus found that the petitioners had failed to establish a constitutional deprivation cognizable under § 1983.

The Court of Appeals affirmed the decision of the District Court. After reviewing the outlines of the layoff plans and the petitioners' challenges to the formulation and implementation of these plans, the Court held that the petitioners did not possess a protected property or liberty interest within the meaning of Board of Regents v. Roth, 408 U.S. 564 (1972). Noting that, in Kentucky, employees may be laid off without a showing of cause, it found that: "It is the cause element which confers upon the property right the imprimatur of constitutionality. Although



plaintiffs may have had an expectation of continued employment it was a unilateral one and does not rise to the level of a constitutionally protected right."

#### REASONS FOR GRANTING THE PETITION

1. This Case Raises an Important Issue of Potential Significance to All Government Employees Concerning the Scope of Property Interests Secured by the Due Process Clause of the Fourteenth Amendment

In recent years, states faced with budgetary crises have looked to governmental reorganization as a source of savings. In this process, the governmental employer's zeal to realize rapid efficiencies often conflicts with the prescribed rights of public employees to a form of job security. This case represents the intersection of this mounting conflict.

The fundamental issue raised by this case is the scope of protected property interests possessed by public employees and secured by the due process clause of the Fourteenth Amendment. Here, the Commonwealth of Kentucky,



through its responsible officials, is alleged to have engaged in a systematic pattern and practice of depriving state employees of their merit system jobs without complying with state statutory and administrative provisions. In essence, these procedures are part and parcel of the employment contract the State entered into with these individuals. By breaching these provisions of the employment contract, the state deprived these employees of a protected property interest without adequate due process.

This case has its origin in this Court's opinion in Board of Regents v. Roth, 408 U.S. 564 (1972), where the modern definition of a property interest was forged:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in



their daily lives, reliance that must not be arbitrarily undermined. Id. at 577.

In Vitek v. Jones, 445 U.S. 480, 490-91 (1980), and Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982), the Court made clear that a state may not deprive a person of a protected liberty or property interest simply by specifying "its own procedures that it may deem adequate for determining the preconditions to adverse official action." Logan v. Zimmerman Brush Co., 455 U.S. at 432, quoting Vitek v. Jones, 445 U.S. at 491.

Last term, in Board of Education v. Vail, 104 S.Ct. 2144 (1984), aff'g 706 F.2d 1435 (7th Cir. 1983), the Court, by an equally divided vote, affirmed a Seventh Circuit decision holding that, under Roth and its companion Perry v. Sindermann, 408 U.S. 593 (1972), a public employee possessed a property interest in a two-year promise of employment that could not be terminated without adequate due process protections. In finding that the



employee had a legitimate expectation of continued employment, the Seventh Circuit pertinently observed: "When the government acts as employer, the application of the Due Process Clause protects the individual from arbitrary and capricious conduct and legitimizes governmental action when exercised through proper channels." 706 F.2d at 1438.

In many ways, the present case is even stronger than the Roth-Logan-Vail line of precedent. For here, the Kentucky employees who were laid off had a legitimate expectation that they would continue in their civil service jobs unless the State, in laying them off, took into account their qualifications, performance records, conduct, and seniority in service as prescribed by KRS § 18.210(14) and applicable regulations. By failing to abide by this statutory mandate, which is an integral part of the bundle of conditions that compose the petitioners' property interest, the State effectively



breached its contract with these employees. This breach constitutes a violation of the due process clause.

In the Courts below, the state took the position that, whatever violations of state law might have occurred, the petitioners had available a channel of review through the State Personnel Board, whose members are respondents in this lawsuit. This position, however, ignores the systematic nature of the due process violation alleged by the respondents. Had the state failed to comply with state lay-off rules in random, individual cases, the existence of potential post-termination remedies might support the respondents' position. Here, though, the due process violations were authorized and carried out across-the-board pursuant to official policy and practice. In this situation, the availability of state remedies does not control the due process question. See Hudson v. Palmer, 52 U.S.L.W.



5052, 5056 (U.S. July 3, 1984); Parrott v. Taylor, 451 U.S. 527, 541 (1981).

In sum, the present case raises a due process issue of major importance to all public employees. The issue is controlled by this Court's decisions in Roth, Vitek, and Logan. This Petition should be granted to correct the Sixth Circuit's misapplication of these far-reaching precedents.

2. This Case Involves A Due Process Issue Scheduled to be Decided This Term in Cleveland Board of Education v. Loudermill, 721 F.2d 550 (6th Cir. 1983), cert. granted, 104 S.Ct. 2384 (1984).

Once it is determined that the petitioners possess a constitutionally protected property interest in their employment, the adequacy of the predeprivation procedures used by Kentucky in effecting the layoffs in this case becomes a central issue. At the core of this case is the question whether Kentucky was required to accord the petitioners adequate procedural protections prior to laying them off. Such procedures would



have afforded the petitioners in this case an opportunity to determine whether their qualifications, performance records, conduct, and seniority in service were in fact considered prior to their lay-offs. By regulation, the State was required to notify each employee fourteen days prior to the effective date of the layoff of the reasons for the layoff and of the employee's right to appeal. A personal interview must also be conducted. 101 KAR 1:120 § 2(1). In their complaint, the petitioners claimed that this process was not uniformly followed and, in any event, was inadequate to determine whether the State complied with its obligations to status employees in effecting the layoffs. The petitioners were not afforded a "reasonable" opportunity to be heard or to challenge their layoffs.

In Cleveland Board of Education v. Loudermill, 721 F.2d 550 (6th Cir. 1983), cert. granted, 104 S.Ct. 2384 (1984), and Parma



Board of Education v. Donnelly, 721 F.2d 550 (6th Cir. 1983), cert. granted, 104 S.Ct. 2384 (1984), this Court will consider the extent of constitutionally-mandated due process procedures necessary to protect a government employee's property interest in his or her employment prior to its termination. This issue, whose determination flows from a long line of recent Supreme Court cases (see the discussion of these cases in Davis v. Scherer, 52 U.S.L.W. 4956, 4961 (U.S. June 28, 1984) (Brennan, J., dissenting)), presents itself squarely in the present case. Accordingly, this Court's decision in Loudermill and Donnelly will have a direct bearing on the decision of the Court of Appeals in this case. At a minimum, the Court should remand this case to the Court of Appeals for reconsideration in light of its forth-coming decisions in Loudermill and Donnelly, if the results in those cases conflict with the decision by the Court of Appeals here.



## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Court.

Respectfully submitted,

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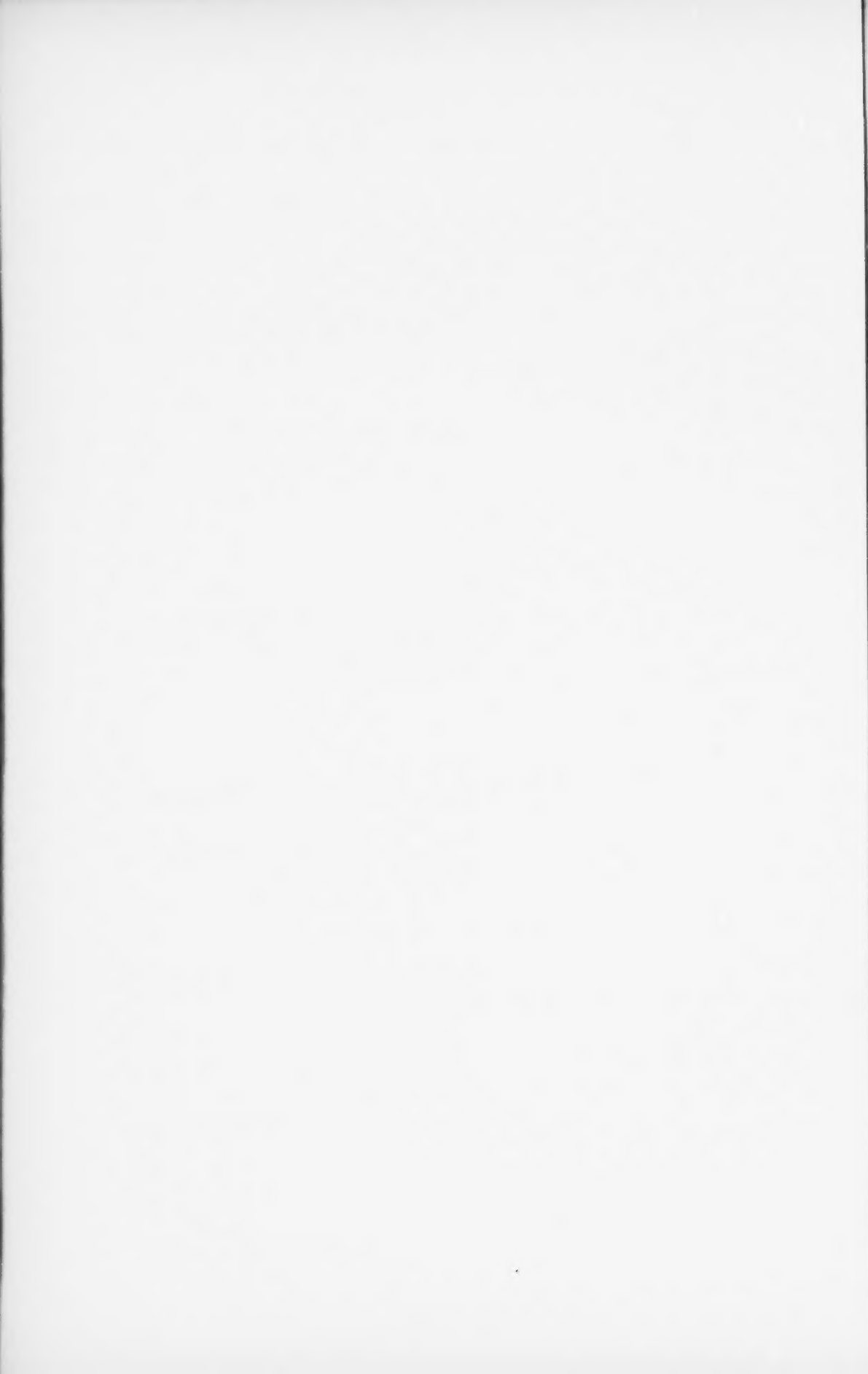
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## Counsel for Petitioners

BY: James H. [illegible]

July, 1984



APPENDIX A

83-5137

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

SHELBY RIGGS, <u>et al.</u>	)
	)
PLAINTIFFS-APPELLANTS,	)
	)
COMMONWEALTH OF KENTUCKY,	)
<u>et al.</u>	)
	)
DEFENDANTS-APPELLEES	)

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
WESTERN DISTRICT OF KENTUCKY

[Decided and Filed April 10, 1984]

BEFORE: KEITH and KRUPANSKY, Circuit  
Judges, and PHILLIPS, Senior  
Circuit Judge

PER CURIAM. Plaintiffs, forty-two laid  
off merit service employees of the Common-  
wealth of Kentucky, filed suit under 42  
U.S.C. § 1983 alleging constitutional viola-  
tions arising from their discharge from em-  
ployment. Named defendants are the Common-  
wealth of Kentucky, the Governor and thirty-



five officers of the Commonwealth both in their official and individual capacities.

The defendants filed motions to dismiss for lack of jurisdiction and motions for summary judgment. On March 19, 1982, the district court filed a memorandum and order which remanded all motions until a decision was reached in a case then pending before the Supreme Court.<sup>1</sup> On January 28, 1983, the district court dismissed with prejudice all but one of plaintiffs' claims.<sup>2</sup> Plaintiffs filed their notice of appeal from this dismissal. For the following reasons we affirm the decision of the district court.

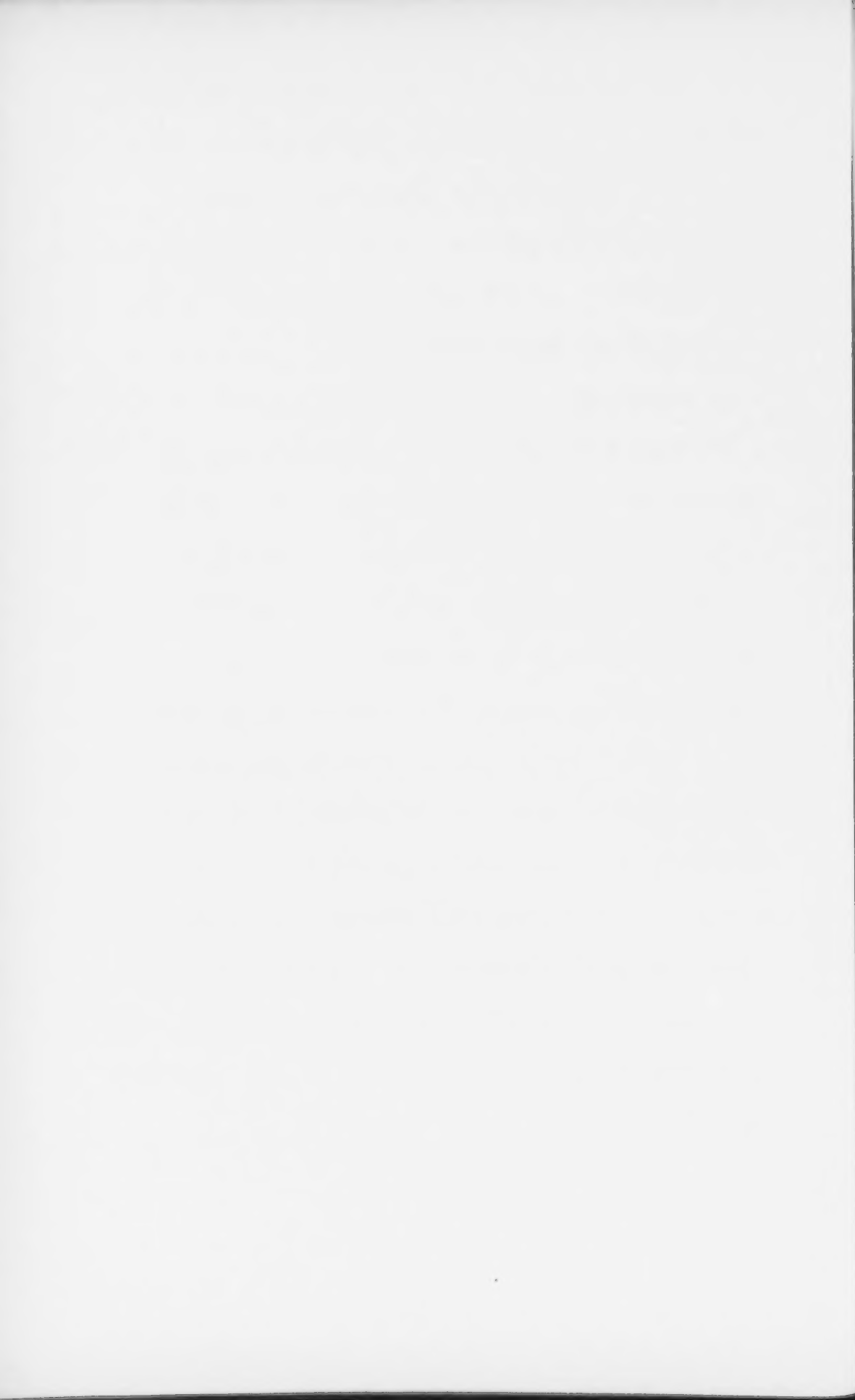
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<sup>1</sup> Patsy v. Board of Regents, 457 U.S. 496 (1982) addressed the issue of whether a party must exhaust state remedies before seeking federal relief. The high court determined that exhaustion was not required, thus leaving the district court to reach the merits in the instant case.

<sup>2</sup> The one claim not dismissed charged that the lay-off plan had a disparate impact on employees over forty years of age. This claim is not before the Court on appeal.



In September of 1979, when John Y. Brown assumed office as the Governor of Kentucky, he and his department heads undertook an analysis of state government in an effort to reduce expenditures. The reduction in expenditures was required to meet Kentucky's constitutional mandate for a balanced budget. It was necessary to impose substantial budgetary cutbacks in order to meet this mandate. Therefore, Governor Brown directed all department heads to review their operations with the aim of reducing the number of active personnel. This action by the Governor was taken pursuant to Chapter 12 of the Kentucky Revised Statutes (KRS) which gives the Governor the authority to establish, abolish or alter the organization of any agency or statutory department in order to promote economy, efficiency and improve administration.



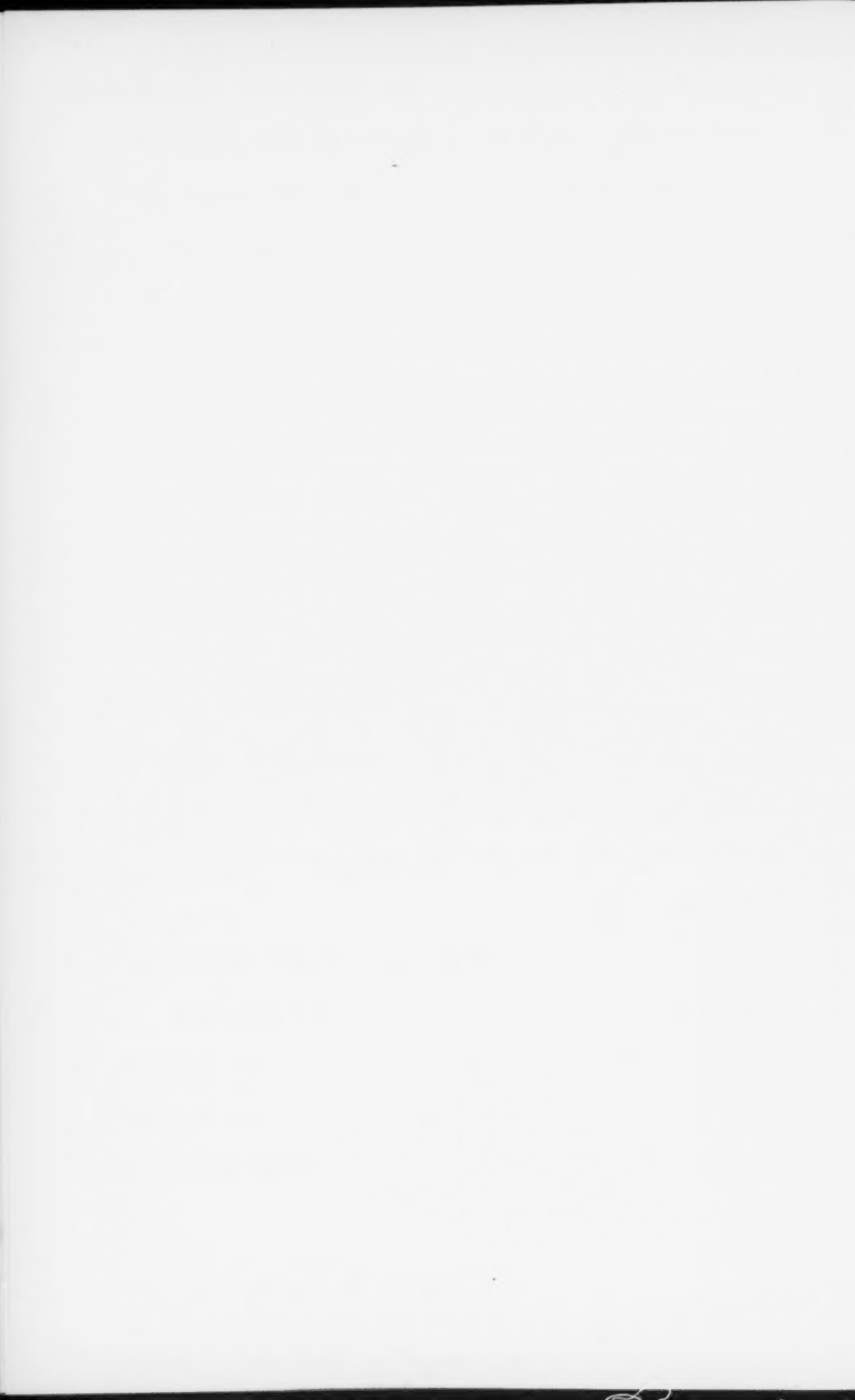
Beginning in December 1979 and continuing through October 1981, the various department and agency heads of state government developed and put into effect some 254 lay-off plans affecting approximately 1,800 state merit system employees. Each of the named plaintiffs was scheduled for lay-off from state government service pursuant to one or more of these layoff plans. As a result of these plans, each of the named plaintiffs asserts they were laid off or terminated from state employment; forced to retire or resign from government service; demoted or otherwise adversely affected in his or her employment.

Defendants allege that the various lay-off plans were developed pursuant to specific procedures found in the statutes of Kentucky and the regulations developed under these laws. KRS 18.210 requires that the Commissioner of Personnel establish rules and regulations for the hiring and dismissal of employees.



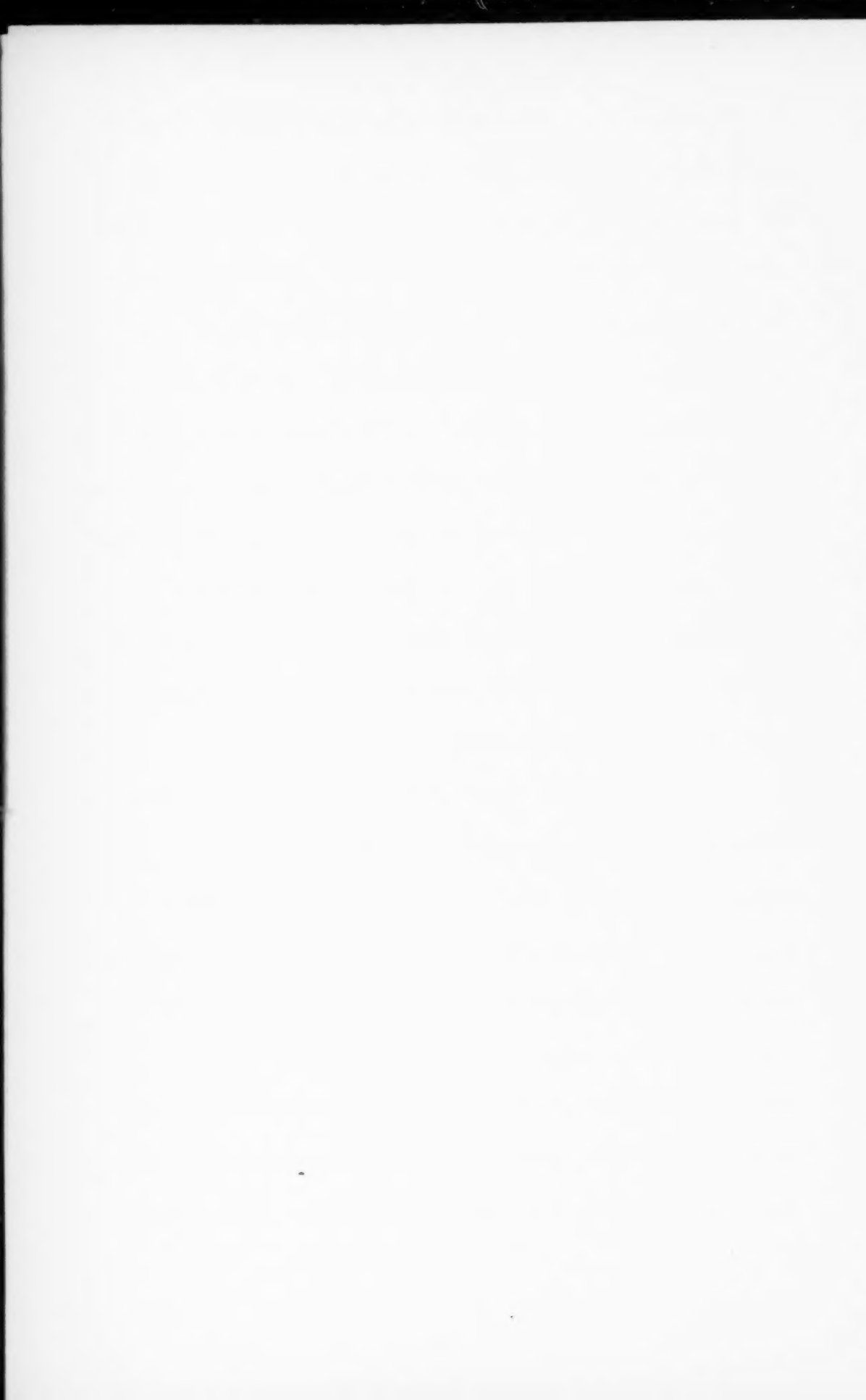
Section 101 et seq. of the Kentucky Administrative Regulations authorized the preparation and implementation of layoff plans by all state departments. Each layoff plan developed and implemented by the respective departments of state government was allegedly different. The departments varied in size and function. Plans were developed at different time periods over the course of twenty months from December 1979 through October 1981, and cutbacks in the respective departments varied because of budgetary considerations. Nevertheless, each of the plans was consistent in that it was to be put into effect only upon the condition that it complied with KRS 18.210 et seq. and 101 KAR 1:010 et seq.

Following the adoption of the numerous plans now objected to and their approval by the Department of Personnel, each department was required by the statutory provisions to provide notice to the individual employees



involved. These rights also provided that each employee be given a brief explanation of the reason for the layoff and an exit interview. Reemployment rights were available to each laid off employee for one year and the rights had to be requested in writing by an employee. These rights included the ability to block the State Employment Register so that no new employee could be hired if the laid off employee could fill the vacancy. The employee also had the statutory right to appeal first to the state personnel board and then to the courts.

Plaintiff's complaint alleges that the defendants formulated and implemented layoff plans in which they failed to consider the seniority, service records, performance appraisals, conduct and qualifications of the employees to be laid off in violation of the Kentucky statutes and regulations. The plaintiffs also allege that the defendants failed to consider the laid-



off employees on the reemployment register. The plaintiffs contend that the defendants' improper formulation and implementation of the layoff plans violated the plaintiffs' due process and equal protection rights afforded them pursuant to Section 1983 and the fourteenth amendment to the United States Constitution.

The defendants made a motion to dismiss for lack of subject matter jurisdiction, and the district court granted their motion. We are in agreement with the district court's decision.

The Eleventh Amendment to the United States Constitution provides:

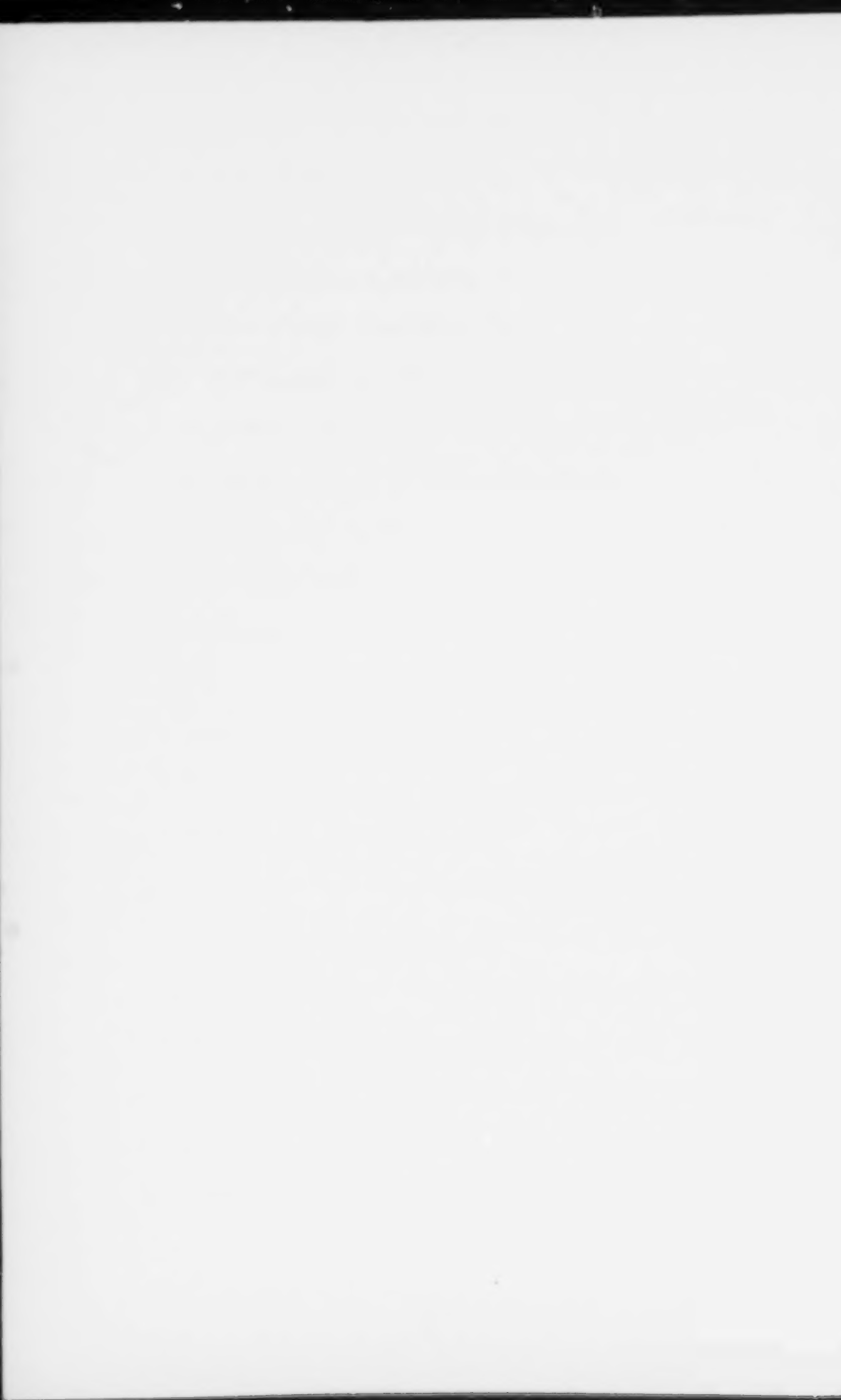
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any foreign state.

In Hans v. Louisiana, 134 U.S. 1 (1889) the Supreme Court held that a state cannot



be sued in a United States court by one of its own citizens unless the state gives its consent. See also Edelman v. Jordan, 415 U.S. 65 (1974). In Quern v. Jordan, 440 U.S. 332 (1979) the Supreme Court reaffirmed the proposition set forth in Hans and its progeny, but added a further prohibition: the state could not be sued in a federal court by one of its citizens who brought a cause of action based on Section 1983. Thus, the state of Kentucky is immune from suit, and the district court was correct to conclude it had no jurisdiction over this matter.

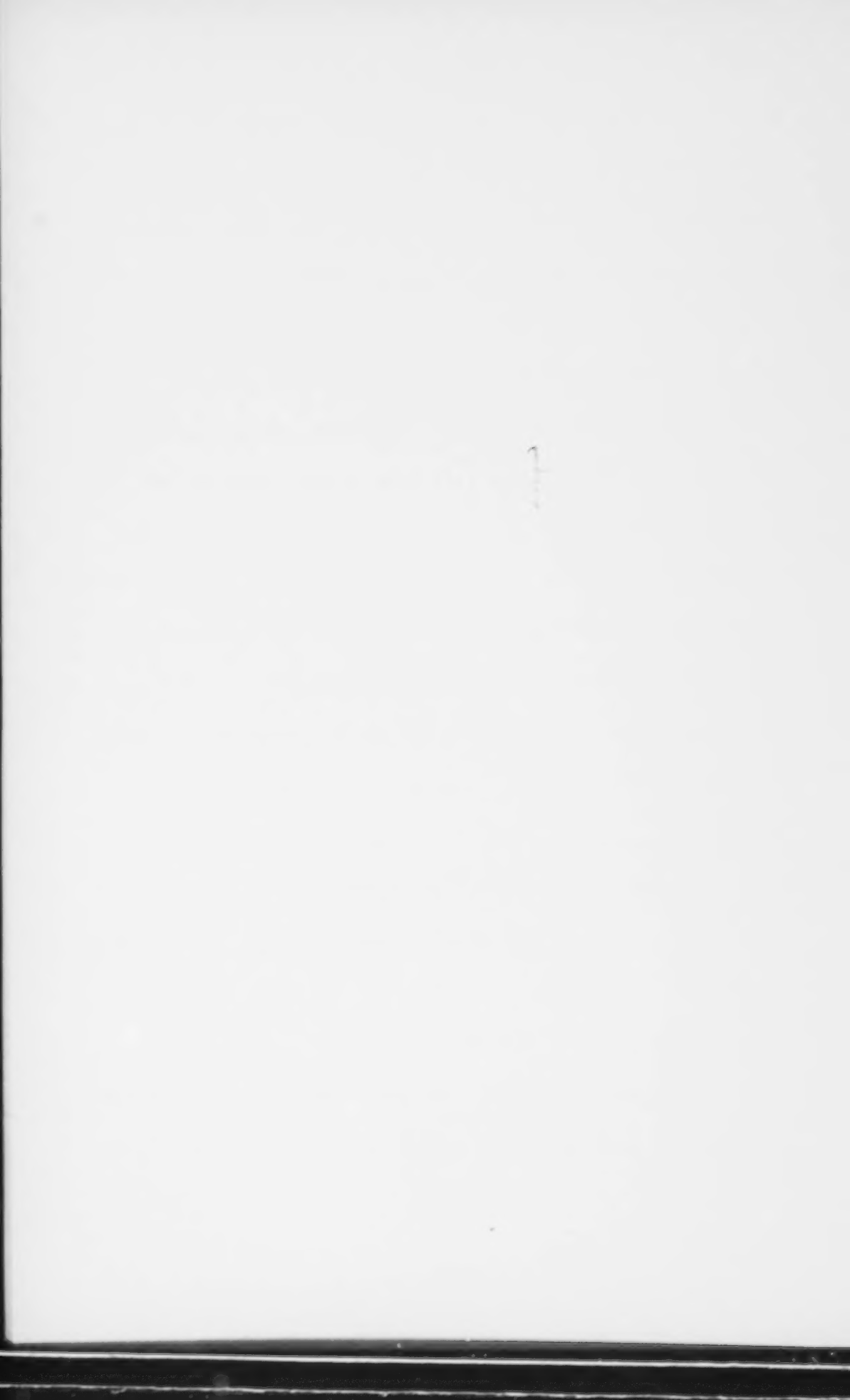
The district court also found that the individual defendants would be entitled to a qualified immunity from suit if they could show that their actions were taken in good faith and were within reason under the circumstances. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975). However, a qualified immunity



would not be available to the official "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the Constitutional rights of the student affected . . . ." Id. at 322. The district court found it unnecessary to further address the issue of a qualified immunity because plaintiffs had failed to establish the deprivation of a Constitutional right. We agree. In order to raise a claim in federal courts the plaintiff has to establish the deprivation of a Constitutionally protected property right. The existence of a protectable property right is determined under state law. Board of Regents v. Roth, 408 U.S. 564 (1972).

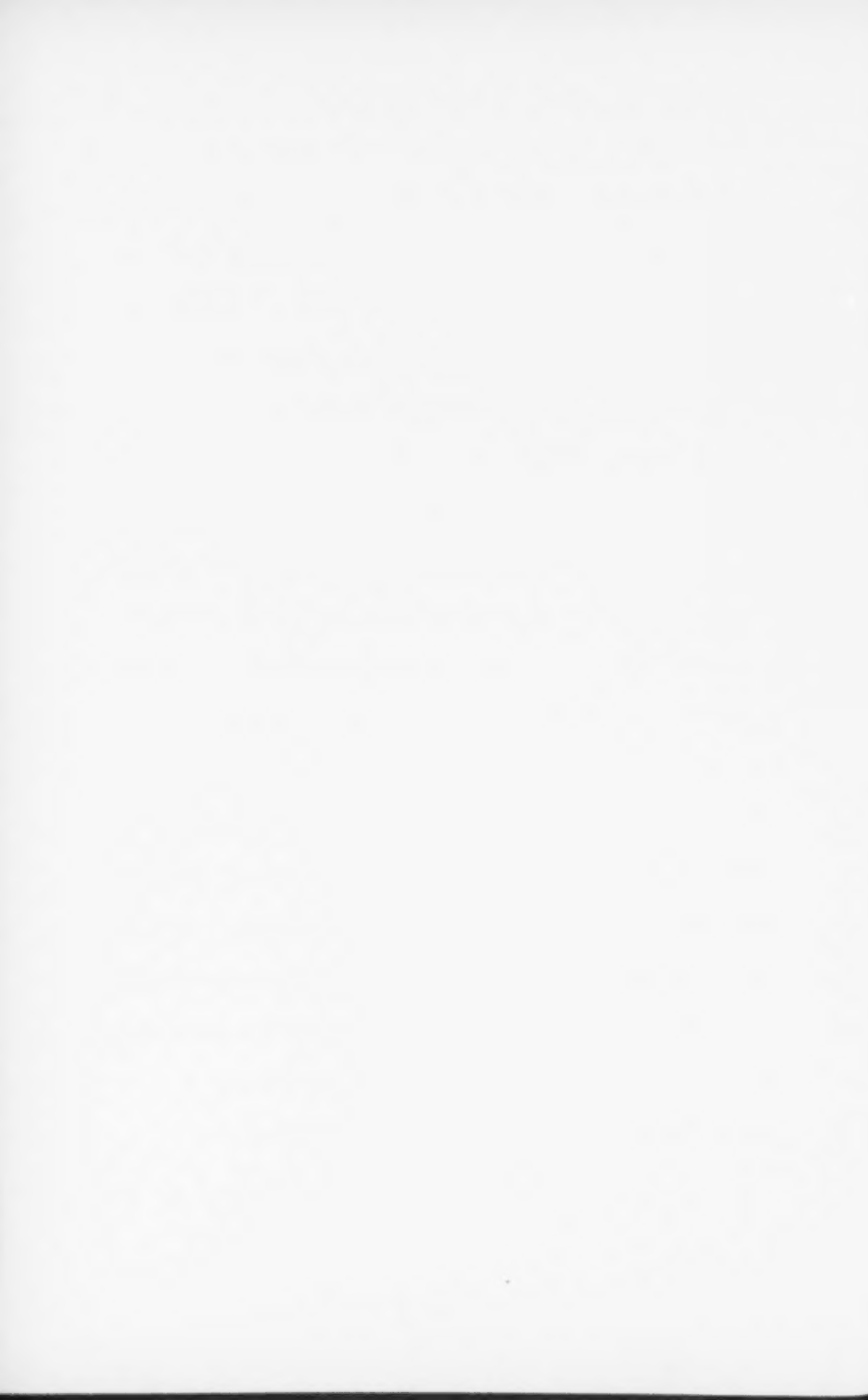
Although plaintiffs argue that they have a property interest under Kentucky's Revised Statute, 18.110(17) a review of the statute indicates to the contrary.

The commissioner of personnel is directed in KRS 18.210(14) to establish rules for "lay-



offs by reasons of lack of funds or work, or abolishment of a position, or material change in duties or organization . . . ." An employee who is laid off may appeal that decision as provided in 101 KAR 1:130. KRS 18.210(16) additionally provides that a merit status employee may be discharged only for cause.

Clearly there is a distinction between a discharge and a layoff. Kentucky's statute provides that a discharge cannot take place absent cause. The Kentucky statute governing layoffs contains no requirement to show cause. It permits layoffs due to reorganization, lack of funds, or work, or the abolishment of positions. It is the cause element which confers upon the property right the imprimatur of constitutionality. Although plaintiffs may have had an expectation of continued employment it was a unilateral one and does not rise to the level of a constitutionally protected right.



Plaintiffs did not assert in either their briefs or at oral argument that a protectable liberty interest was violated by the layoff, nevertheless, we agree with the district court's finding that plaintiffs failed to prove the existence of a constitutionally protected liberty interest. The case at bar does not satisfy the requirement that the layoff was a stigma which affected the individuals' reputation or standing in the community. See Board of Regents of State Colleges v. Roth, supra.

Accordingly, the judgment of the Honorable Thomas A. Ballantine of the United States District Court for the Western District of Kentucky is affirmed.



APPENDIX B

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

SHELBY E. RIGGS, <u>et al.</u>	)
	)
PLAINTIFFS	)
	)
VS.	)
	)
COMMONWEALTH OF KENTUCKY,	)
<u>et al.</u>	)
	)
DEFENDANTS	)

NO. C 81-0544-L(B)  
[Decided and Filed January 28, 1983]

MEMORANDUM

This matter is before the Court on the motion of the defendants to dismiss for lack of jurisdiction and for summary judgment.

This is an action brought under 42 U.S.C. Section 1983 alleging constitutional violations resulting from the discharge of a large number of state employees and stating a claim for age discrimination. The Court had remanded the motion pending the outcome of the case of Patsy v. Board of



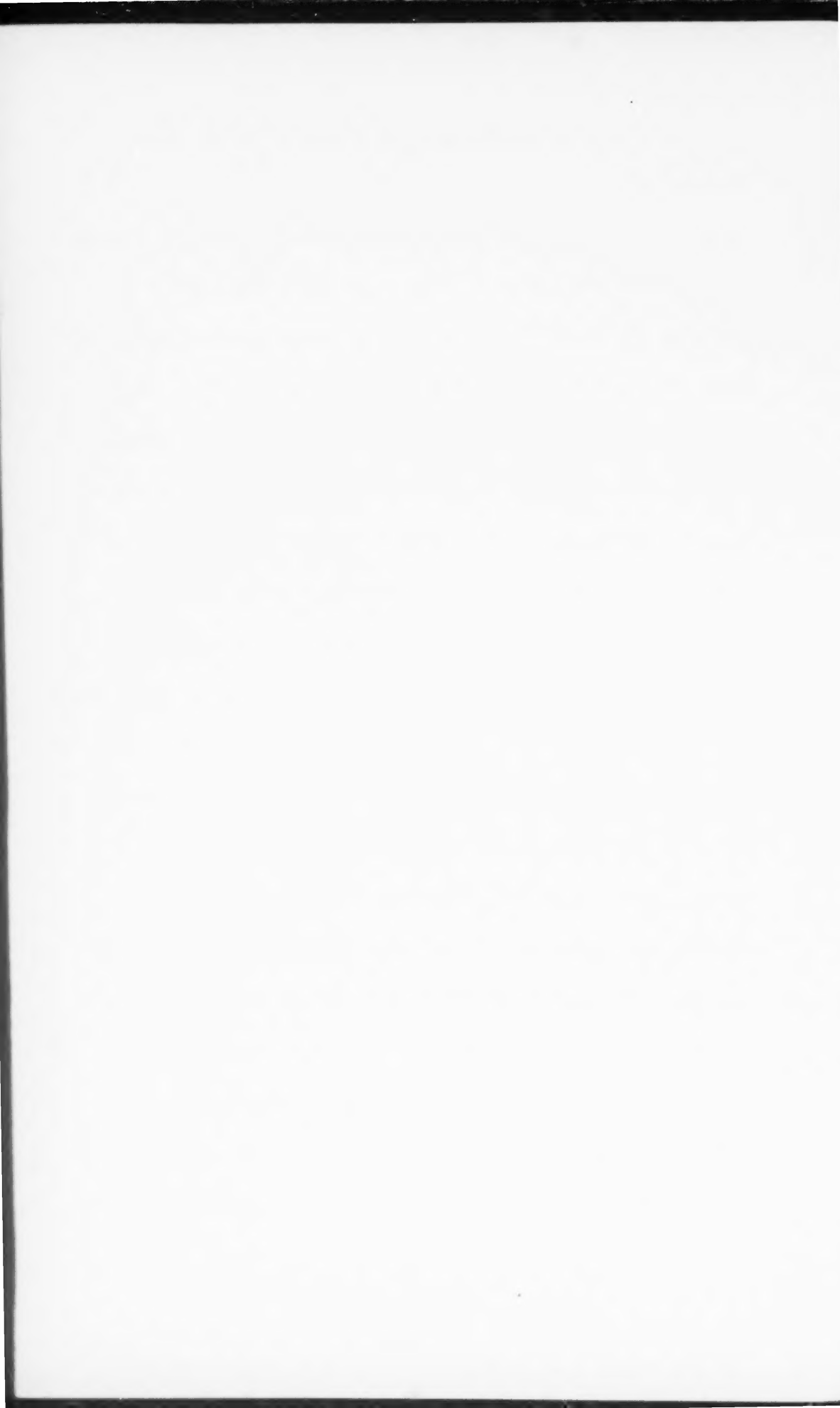
Regents of the State of Florida, \_\_\_\_ U.S. \_\_\_\_ , 102 S.Ct. 2557 (1982). That case dealt with the exhaustion of state remedies prior to the bringing of a Section 1983 action. The Supreme Court's having determined that exhaustion of state remedies was not required, we now turn to the matter of the defendants' motion.

The plaintiffs are state merit system employees who were laid off pursuant to plans implemented in December of 1979 and continuing through the present. The defendants are the Commonwealth of Kentucky, the Governor, and thirty-five (35) officers of the Commonwealth, both in their individual and official capacities. The complaint alleges that the defendants formulated and implemented lay-off plans in which they failed to consider the seniority, service records, performance appraisals, conduct and qualifications of the employees to be laid off in violation of the Kentucky statutes and regu-



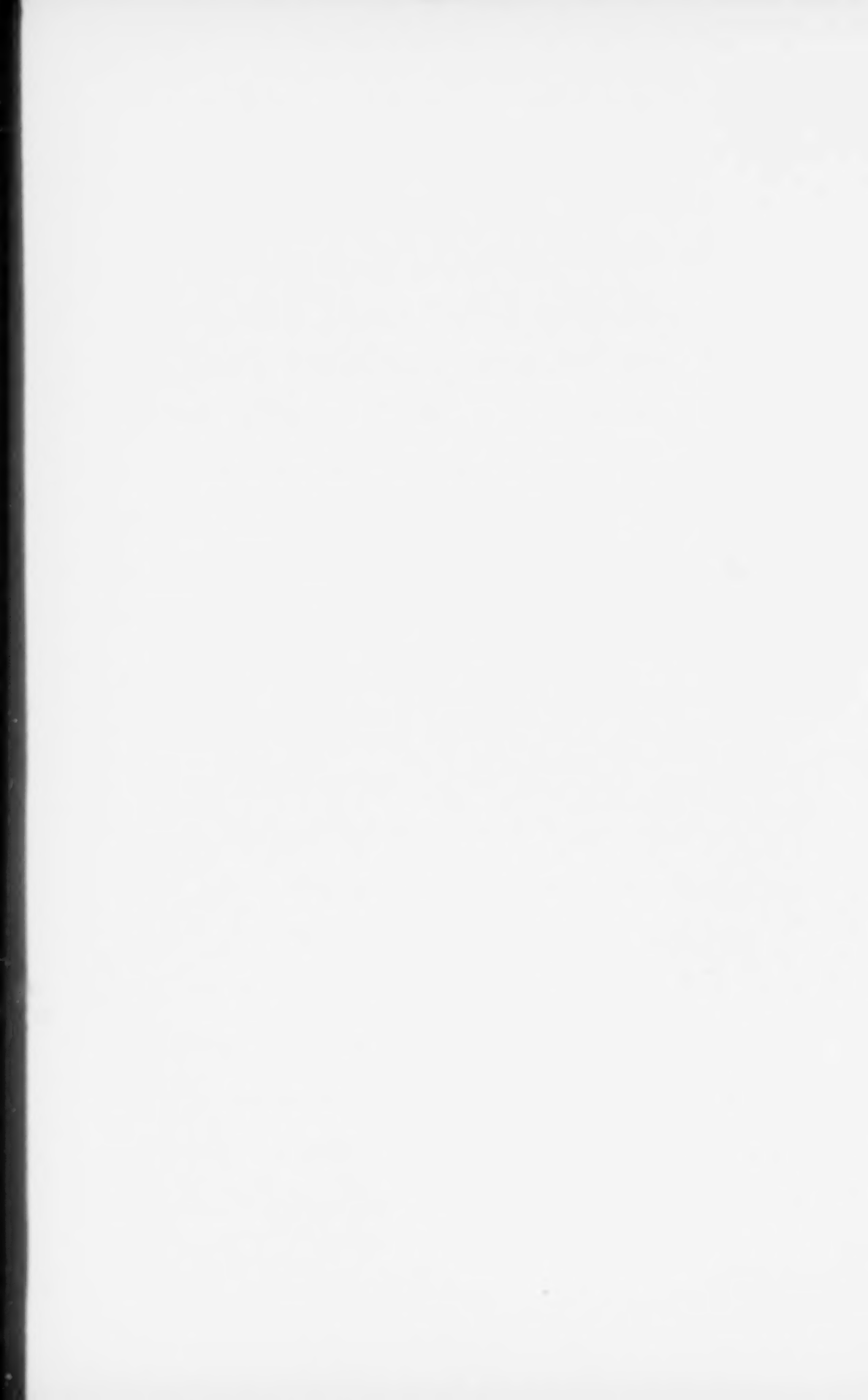
lations. The plaintiffs also allege that the defendants failed to consider the laid-off employees on the reemployment register. The plaintiffs contend that the defendants' improper formulation and implementation of the lay-off plans violated the plaintiffs' due process and equal protection rights afforded them pursuant to Section 1983 and the Fourteenth Amendment to the United States Constitution. The plaintiffs also claim that the lay-off plans as implemented had a disparate impact on those persons who were over 40 years of age.

The defendants seek to have dismissed Counts one through four of the complaint, based upon the allegation that the Court lacks jurisdiction of the subject matter by virtue of the Eleventh Amendment to the U.S. Constitution. Although the Eleventh Amendment by its terms is not applicable to a suit against a state by one of its own citizens, the immunity afforded by the amendment



long has been held to extend to such an instance. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504 (1890). The Eleventh Amendment has been held to be a bar to Section 1983 actions against a state. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979); Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057 (1978). It is clear that the action against the Commonwealth of Kentucky is barred by the protection afforded under the Eleventh Amendment.

The defendants also urge dismissal of the first four counts of the complaint as against the individual defendants on the grounds that they also are immune from suit under the Eleventh Amendment. The case of Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974), confirmed the rule that a federal court claim made by private parties against a state which could result in payment having to be made from the public funds in the state treasury is barred by the Eleventh Amendment.



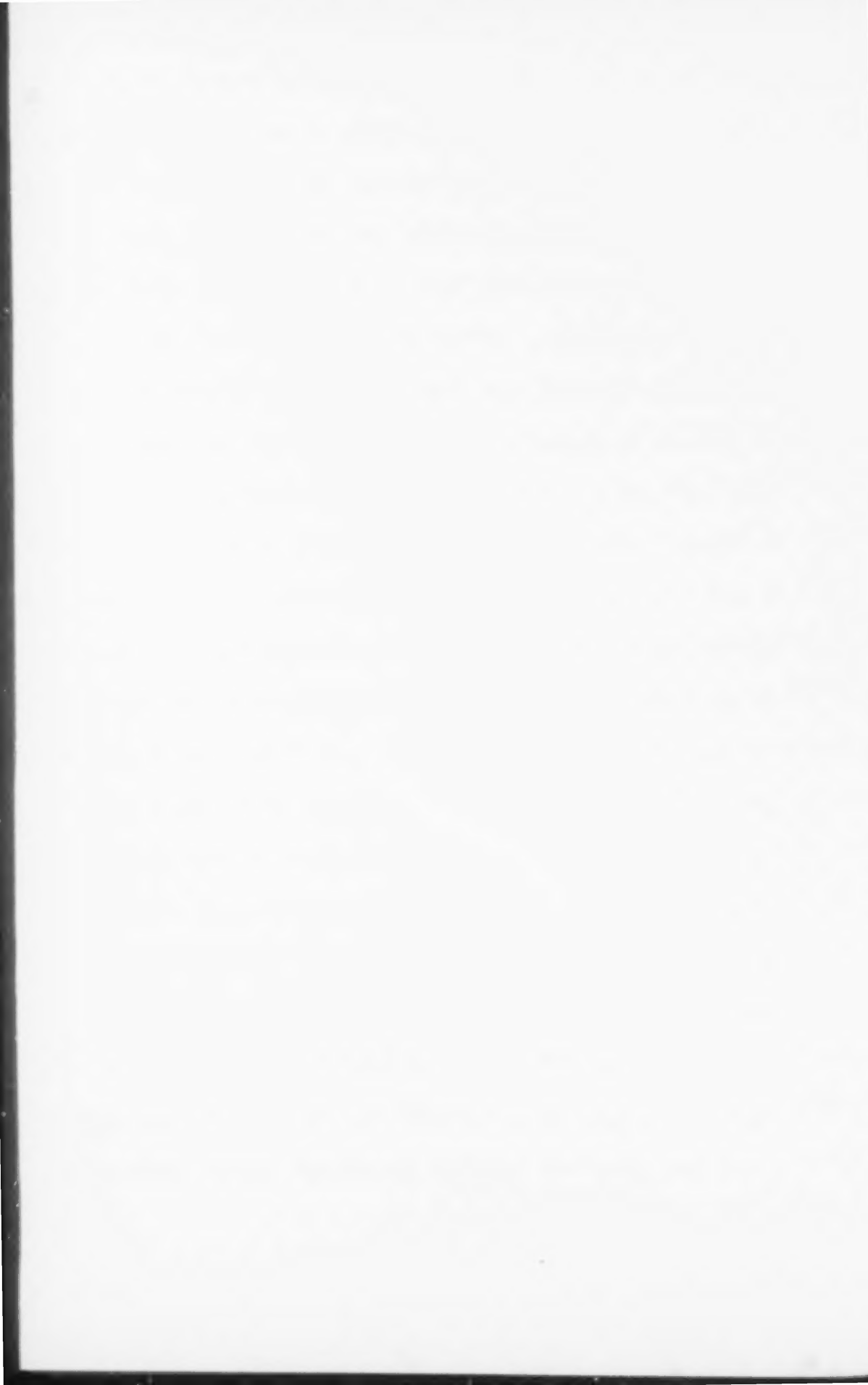
However, in the much earlier case of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908), it was held that state officials could be enjoined to conform their conduct in the future to federal requirements, even though such might cause funds to be expended from the state treasury. These holdings were explained in Quern v. Jordan, supra, to distinguish retrospective from prospective relief. Applying these principles to the instant case, we determine that the claims against the state officers insofar as they might result in a retrospective liability to the state must be dismissed. The state officers' liability, if any, may be only prospective.

The individual defendants insist that • they are absolutely immune from liability. The defendants, as state officials, may rely only on the qualified immunity explained in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974) and Wood v. Strickland, 420 U.S.



308, 95 S.Ct. 992 (1975). Those cases held that executive officers should not need to exercise discretion with undue timidity. Therefore, actions taken in good faith and within reason under the circumstances will not be punished. However, the qualified immunity is not available if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . ." Id. at 322, 95 S.Ct. at 1001. The defendants argue that even if qualified immunity is applicable here, the complaint should be dismissed because the plaintiffs have not established the deprivation of a constitutional right.

The plaintiffs maintain that they have a property interest in continued employment because of having attained merit employee



"status" which is defined in KRS 18.110(17), as "tenure with all rights and privileges appertaining thereunto . . ." The plaintiffs argue that merit status employees can be demoted or affected adversely in their employment only for cause. In Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), the Supreme Court, in discussing property interests in employment, stated that such interests are created and defined by state law and rules. With this in mind, we examine the applicable Kentucky law.

The commissioner of personnel is directed in KRS 18.210(14), to establish rules for "lay-offs by reasons of lack of funds or work, or abolishment of a position, or material change in duties or organization . . ." Rules were established in 101 KAR 1:120 Section 2. An employee who is laid off may appeal that decision as provided in 101 KAR 1:130. KRS 18.210(16) additionally provides that a merit



status employee may be discharged only for cause. While we agree that a state employee may be discharged only for cause, a lay-off which is not the same as a discharge does not require "cause". Under the Kentucky statutes and regulations, KRS 18.210 and 101 KAR 1:120, reemployment of a laid-off worker is specifically contemplated, but not for the discharged employee. The Kentucky statutes and regulations provide certain protection for employees in the procedure for appeals of lay-offs and discharges, but in no way indicate that an employee is guaranteed a permanent position.

The plaintiffs argue that their case is analogous to that of the state employee in Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983, 101 S.Ct. 399. We cannot agree. In Thompson, the Alabama law provided only for discharge for cause. That is not the case here. The Kentucky personnel statutes provide for discharge for cause, but they also provide for



lay-off due to reorganization, lack of funds or work, or the abolishment of a position. It is obvious that a lay-off plan does not have to incorporate "cause" as used in the discharge provisions. A Kentucky employee may not argue that he or she may be discharged only for cause and feign ignorance of the statutory provision for lay-off which does not include a "cause" determination. A Kentucky employee's claimed entitlement to continued employment is no more than a unilateral expectation and does not rise to the level of a constitutionally protected property right. Board of Regents of State Colleges v. Roth, supra.

The plaintiffs also allege a liberty interest in their positions, based upon their contention that their lay-offs might indicate they were less capable or performed less ably than employees who were not laid off. This claim is a far cry from the situation of a state's making charges against



the employees which could result in damage to their community standing and associations as discussed in the Roth case. Especially in a troubled economy, we fail to perceive how being laid-off could in any way stigmatize an employee, let alone rise to the level of a deprivation of liberty.

The plaintiffs have failed to establish any constitutional deprivations in their complaint. Further, the plaintiffs have not alleged any individual wrongdoing on the part of any of the defendants. The defendants' motions to dismiss Counts one through four of the complaint must be granted.

The defendants move for summary judgment on Count five of the complaint which states a claim of age discrimination. The defendants argue that summary judgment is proper because no claim was filed with the Equal Employment Opportunity Commission within the 180 or 300 day requirement of 29 U.S.C. Section 626 and no disparate impact was



caused to persons over 40 years of age. The plaintiffs respond that at least two timely claims were filed and that those claims are sufficient for the whole class of plaintiffs. Plaintiffs further maintain that a material fact issue exists with respect to the alleged disparate impact on those persons over 40 years of age.

A motion for summary judgment will be granted only where there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56. In considering a motion for summary judgment, all inferences must be drawn most favorably toward the party resisting the motion. State Mutual Life Assurance Company of America v. Deer Creek Park, 612 F.2d 256 (6th Cir. 1979).

The plaintiffs insist that, at least, the affidavits of Marvin Cole and Billy Furnish were filed within the time requirement of 29 U.S.C. Section 626. Each affidavit refers to



claims having been filed with the E.E.O.C. However, neither has attached to it any copies of the claims filed as required by F.R.Civ.P. 56(e). For this reason, the defendants argue that the affidavits are insufficient.

Mr. Cole's affidavit states that he was given no papers, but that he was told recently that he had a complaint on file which would relate back to September of 1980. Mr. Cole had been laid-off on May 15, 1980. Mr. Furnish's affidavit merely states that he filed a charge with the E.E.O.C. Especially in the situation of Mr. Cole where he was given no papers, we cannot state that the affidavits are insufficient to prevent the entry of a summary judgment. In avoidance of a summary judgment, the affidavits support an inference that a claim was filed with E.E.O.C., leaving the issue of the sufficiency of that filing under 29 U.S.C. Section 626(d) to be determined. Smith v. Liberty Mutual



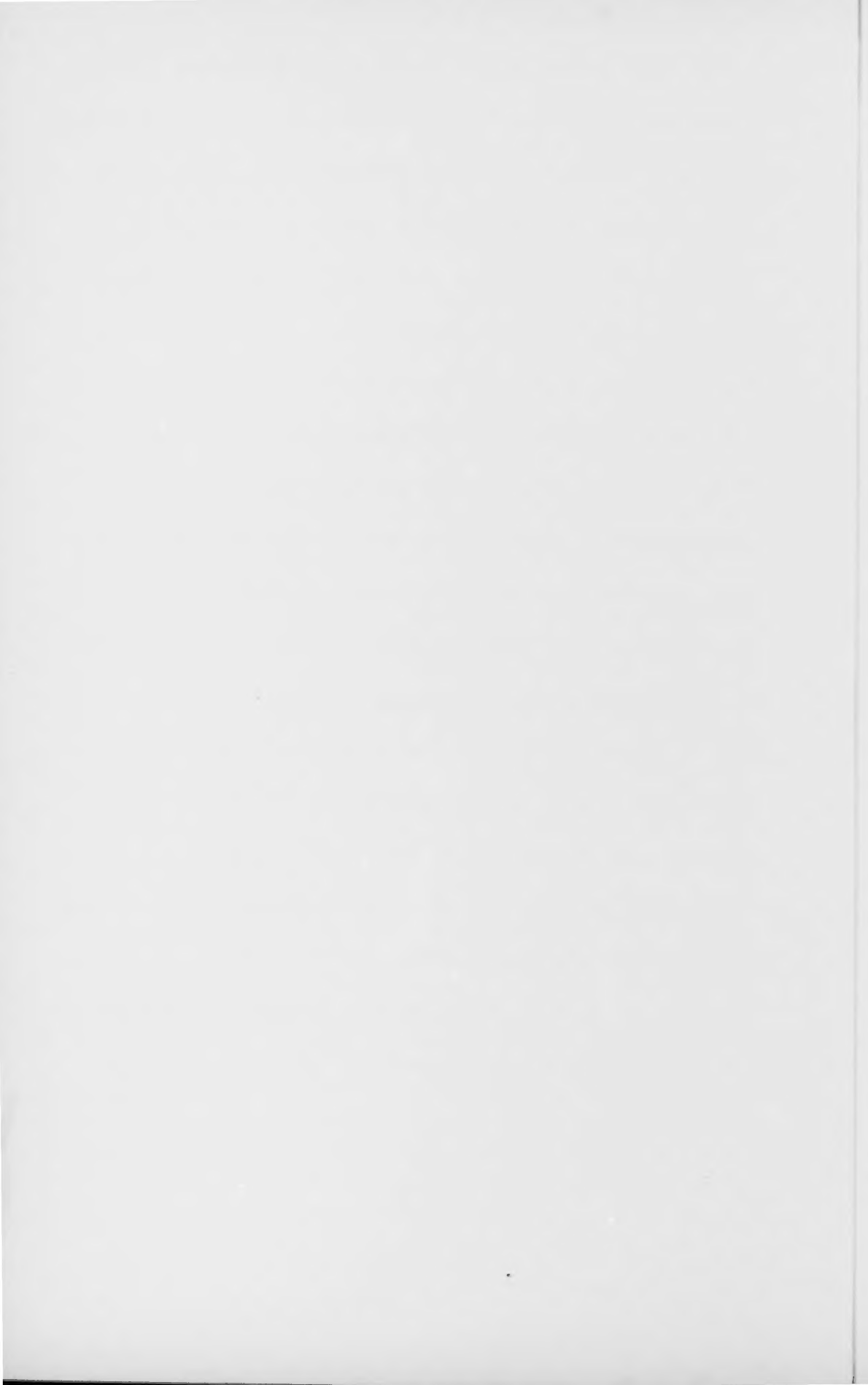
Insurance Co., 409 F. Supp. 1211 (M.D. N. Car. 1976).

The defendants argue that even if these two complaints are found to have been filed in a timely manner, they are not sufficient to provide notice for the entire class. It has been held that a notice filed by an individual on behalf of himself and similarly situated employees, satisfied the notice requirement for the class. Bean v. Crocker National Bank, 600 F.2d 754 (9th Cir. 1979); Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980). Mr. Furnish stated in his affidavit that he filed the complaint with E.E.O.C. because he believed that he and others were discriminated against on the basis of age. Again, drawing the inference most favorable to the party opposing the summary judgment motion, Mr. Furnish's affidavit supports an inference of a filing on behalf of all those persons similarly situated.



The defendants last urge summary judgment on the age discrimination claim because the statistics of the defendants show that the number of employees over 40 actually increased after the lay-offs. While this may be true, the plaintiffs' affidavits state that they were replaced by persons of less seniority and training, giving rise to a permissible inference that the replacement employees were younger persons. The ultimate issue is whether age was a factor in the employer's decision. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982). The plaintiffs, at this time, have kept the issue open, so as to preclude the entry of a summary judgment.

The motion of the defendants to dismiss Counts one through four of the complaint is granted and the motion for summary judgment on Count five is denied.



An appropriate order has been entered  
this date.

January 28, 1983

/S/ Thomas A. Ballantine, Jr.  
THOMAS A. BALLANTINE, JR.  
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record



APPENDIX C

NO. 83-5137  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

SHELBY RIGGS, <u>et al.</u> ,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	O R D E R
	)	
COMMONWEALTH OF KEHTUCKY	)	
<u>et al.</u> ,	)	
	)	
DEFENDANTS-APPELLEES	)	

[Filed May 1, 1984]

BEFORE: KEITH, KRUPANSKY, Circuit Judges  
and PHILLIPS, Senior Circuit Judge  
Upon consideration of the appel-  
lants' petition for rehearing filed with the  
Court,

It is ORDERED that the petition for  
rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/S/ John P. Hehman  
JOHN P. HEHMAN, CLERK